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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RONALD W. ROSENBERGER, *et al.*,
Petitioners,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,
Respondents,

On Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether *Lemon v. Kurtzman* and its progeny, which foster discrimination against Religion and religious adherents, contrary to the principle of equality embodied in the Religion Clauses, should be overruled?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

I. THE HAPHAZARD AND UNPRINCIPLED USE OF *LEMON*, EXCUSING GOVERNMENT ANIMOSITY TOWARDS RELIGION AND DISCRIMINATION AGAINST RELIGIOUS CITIZENS, MUST END 3

A. In This Court, Inconsistent Reliance on the *Lemon* Test Has Created a Confused First Amendment Jurisprudence, While in Lower Courts, Faithful Application of *Lemon* has Created a Marketplace Hostile to Religion 3

B. Because *Lemon* Has Proven Unworkable, That Test, With Its Muddled Progeny, Should Now be Overruled Or Clarified 8

1. The *Lemon* Test Produces Confusion, Not Neutrality 10

a. The Secular Purpose Prong 10

b. The Effects Prong 12

c. The Entanglement Prong 14

2. *Lemon* and its Confusing Progeny Should Be Overruled 17

II. GOVERNMENT MAY NOT USE RELIGION OR RELIGIOUS ADHERENCE AS A BASIS OF CLASSIFICATION EXCEPT TO AVOID INFRINGEMENT OF RELIGIOUS FREEDOM 18

A. The Founders Understood the Religion Clauses to Compliment Each Other, Ensuring that Religion or Religious Adherence is Pertinent Only to Accommodation of Religious Freedom 19

B. This Court's Decisions Judging Religious Classifications, Other than *Lemon* and its Inconsistent Progeny, Employ Equality of Freedom of Belief and Opinion as the Governing Principle 21

1. This Court Used the Equal Protection Clause to Govern the Analysis of Religious Classifications in its Equal Access Cases 21

2. As This Court has Retreated From *Lemon* in Cases Directly Challenging State Action Under the Establishment Clause, Various Opinions Have Recognized Equality as the Governing Principle of the Religion Clauses 24

3. First Amendment Decisions Preceding *Lemon* Recognized Equality as the Governing Principle of the Religion Clause 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: Page(s)

Abington School District v. Schempp,
374 U.S. 203 (1963) 9
Aguilar v. Felton,
473 U.S. 402 (1985) 18
Allegheny County v. Greater Pittsburgh ACLU,
492 U.S. 573 (1989) 5,7
Board of Airport Comm'rs v. Jews for Jesus, Inc.,
482 U.S. 569 (1987) 2,22
Board of Education v. Grumet,
114 S.Ct. 2481 (1994) ..... 4, *passim*
Board of Education v. Mergens,
496 U.S. 226 (1990) 2,14,23-24
Bowen v. Kendrick,
487 U.S. 589 (1988) 26
Bradfield v. Roberts,
175 U.S. 291 (1899) 28
Cantwell v. Connecticut,
310 U.S. 296 (1940) 21,22
Committee for Public Educ. & Religious Liberty v. Nyquist,
413 U.S. 756 (1973) 18
Edwards v. Aguillard,
482 U.S. 578 (1987) 10-12,18
Epperson v. Arkansas,
393 U.S. 97 (1968) 29
Everson v. Board of Education,
330 U.S. 1 (1947) ..... 4, *passim*

Harris v. City of Zion,
927 F.2d 1401 (7th Cir. 1991) 7
Heffron v. ISKCON,
452 U.S. 640 (1981) 22
Holy Trinity Church v. United States,
143 U.S. 457 (1892) 14-15
ISKCON v. Lee,
112 S. Ct. 2701 (1992) 22
Keyishian v. Board of Regents,
385 U.S. 589 (1967) 13
Lamb's Chapel v. School District,
113 S.Ct. 2141 ..... 2, *passim*
Larson v. Valente,
456 U.S. 228 (1982) 4,12,25,26
Lee v. ISKCON,
112 S. Ct. 2709 (1992) 22
Lee v. Weisman,
112 S.Ct. 2649 (1992) 4
Lemon v. Kurtzman,
403 U.S. 602 (1971) ..... i, *passim*
Levitt v. Committee for Public Educ. & Religious Liberty,
413 U.S. 472 (1973) 18
Lovell v. City of Griffin,
303 U.S. 444 (1938) 23
Lynch v. Donnelly,
465 U.S. 668 (1984) 4,8

Page(s)

McCollum v. Board of Education,
333 U.S. 203 (1948) 5
McDaniel v. Paty,
435 U.S. 618 (1978) ..... 8, *passim*
McGowan v. Maryland,
366 U.S. 420 (1961) 12
Marsh v. Alabama,
326 U.S. 501 (1946) 22
Marsh v. Chambers,
463 U.S. 783 (1983) 4
Meek v. Pittenger,
421 U.S. 349 (1975) 18
Mueller v. Allen,
463 U.S. 388 (1983) 3,19,26
Niemotko v. Maryland,
340 U.S. 268 (1951) 22
Police Dep't v. Mosley,
408 U.S. 92 (1972) 22
Rosenberger v. The Rector and Visitors of the University of Virginia,
18 F.3d 269 (4th Cir. 1994) ..... 6, *passim*
School Dist. of Grand Rapids v. Ball,
473 U.S. 373 (1985) 18
Sloan v. Lemon,
413 U.S. 825 (1973) 18
Stone v. Graham,
449 U.S. 39 (1980) 10

Page(s)

Tilton v. Richardson,
403 U.S. 672 (1971) 18
Torcaso v. Watkins,
367 U.S. 488 (1961) 29
Wallace v. Jaffree,
472 U.S. 38 (1985) . . . . . 5, *passim*
Walz v. Tax Commission,
397 U.S. 664 (1970) 5,9,15,29
Widmar v. Vincent,
454 U.S. 265 (1982) . . . . . 3, *passim*
Witters v. Wash. Dept. of Serv. for Blind,
474 U.S. 481 (1986) 26
Wolman v. Walter,
433 U.S. 229 (1977) 18
Zobrest v. Catalina Foothills School District,
125 L.Ed.2d 1 (1993) . . . . . 3, *passim*
Zorach v. Clauson,
343 U.S. 306 (1952) 8,9,15

Other Materials:

MADISON, *A Memorial & Remonstrance Against Religious Assessments*, 1785, Reprinted at 330 U.S. 66 (1947) (App. to opinion of Rutledge, J., Dissenting) 17,20
5 WRITINGS OF JAMES MADISON
(G. Hunt ed. 1904) 25
CORD, SEPARATION OF CHURCH AND STATE,
(1982) 19

Page(s)

MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS (1965) 19
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TRIBE, AMERICAN CONSTITUTIONAL LAW (2d. ed. 1988) 21

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BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS *

The American Center for Law and Justice ("ACLJ") is a national, nonprofit legal organization. The purpose of ACLJ is to preserve, protect and promote religious liberty through education, legal defense, legislative assistance, and related activities. ACLJ attorneys specialize in advocacy of rights to freedom of speech, freedom of conscience, and religious

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* The parties in this case have consented, by a joint letter of consent filed with the Clerk of Court, to the filing of this brief.

liberty. ACLJ's Chief Counsel has argued cases before this Court dealing with issues related to this case, including arguments on behalf of the church in *Lamb's Chapel v. School District*, 113 S.Ct. 2141 (1993), the students in *Board of Education v. Mergens*, 496 U.S. 226 (1990), and the evangelists in *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987).

ACLJ files this brief in support of Petitioner because the state of the law respecting the Religion Clauses of the Constitution requires significant clarification. ACLJ supports the position that private individuals and groups of individuals may not be discriminated against on the basis of their religion, religious adherence, or religious speech in the provision of any general government benefit for which they are otherwise eligible. ACLJ urges the Court to reverse the decisions below.

SUMMARY OF ARGUMENT

Never has this Court enshrined the analysis presented in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as a rigid test in resolving Establishment Clause claims. This Court has repeatedly sought to guard against religious classifications which place religious individuals at an advantage or disadvantage because of their religion. Unfortunately, despite this Court's approach, lower federal courts have made the *Lemon* test the sole means for winnowing out governmental Establishments. One untoward result of rigid applications of the vaguely understandable and easily manipulable *Lemon* test is the absurd results which often are obtained thereby.

If the *Lemon* test has proven unworkable and unfaithful to the purposes of the Religion Clauses, the Court should forthrightly recognize this development. Another test exists, a test which this Court has employed previously, which is more consistent with the original purposes of the Religion Clauses. Other than *Lemon* and its misguided and confusing progeny, this Court's precedents have consistently adhered to a view that equality of voluntary religious choices, whether of nonreligion or a diversity of religious beliefs, is the better and intended understanding of the First Amendment's Religion Clauses. Among the partial applications of this test is the faithful and sensible application of the "effects" prong of *Lemon* as recognized by this Court in *Widmar v. Vincent*, 454 U.S. 263 (1981), *Mueller v. Allen*, 463 U.S. 388 (1983), and *Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462 (1993).

In the case at bar, Respondents suggest that the Establishment Clause justifies denial of a generally available benefit to religious groups and individuals because of their religious activity. This distorted view of "neutrality" is a direct result of the aberration *Lemon* has become on this Court's Establishment Clause jurisprudence. This Court now has the opportunity to restore the principle of equality to the Religion Clauses.

I. THE HAPHAZARD AND UNPRINCIPLED USE OF *LEMON*, EXCUSING GOVERNMENT ANIMOSITY TOWARDS RELIGION AND DISCRIMINATION AGAINST RELIGIOUS CITIZENS, MUST END

A. In This Court, Inconsistent Reliance on the

Lemon Test Has Created a Confused First Amendment Jurisprudence, While in Lower Courts, Faithful Application of _Lemon_ has Created a Marketplace Hostile to Religion

"Rather than mechanically invalidating all government conduct . . . that confer[s] benefits or give[s] special recognition to religion--as an absolutist approach would dictate--the Court has scrutinized challenged . . . official conduct to determine whether, *in reality*, it established a religion or religious faith, or tends to do so." *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (emphasis added).

Since *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court has grappled frequently with governmental activity within the sphere of the religious. In recent years, the test most consistently utilized to judge alleged violations of the Establishment Clause has been the so-called *Lemon* test, set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This Court, however, has applied the *Lemon* test only haphazardly; in a growing number of cases, the Court resolved Establishment Clause claims without any substantive discussion of the *Lemon* test or any apparent application of the test in the decision.[1] Five current Justices have expressed their discomfort with one aspect or another of the *Lemon* test. *See Grumet*, 114 S.Ct. at 2498-2500 (O'Connor, J., concurring in part and concurring in

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1 *See e.g., Board of Education v. Grumet*, 114 S.Ct. 2481 (1994); *see also Zobrest v. Catalina Foothills School District*, 125 L.Ed. 2d 1 (1993); *Lee v. Weisman*, 112 S.Ct. 2649 (1992); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson v. Valente*, 456 U.S. 228 (1982) (*Lemon* not useful in analyzing instances of patent discrimination against a church).

the judgment); *Lamb's Chapel*, 113 S.Ct. at 2149-50 (Scalia, J., together with Thomas, J., concurring in the judgment); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 655-57 (1989) (Kennedy, J., together with Rehnquist, C.J., White J., and Scalia, J., concurring in part and dissenting in part); *Wallace v. Jaffree*, 472 U.S. 38, 107-113 (1985) (Rehnquist, J., dissenting).

Members of this Court have warned of the dangers inherent in a jurisprudence without sound historical and traditional grounding, resting too gingerly on catchy phrases and neat tests. Justice Reed, in *McCollum v. Board of Education*, 333 U.S. 203 (1948), noted that a "rule of law should not be drawn from a figure of speech." *Id.* at 247 (Reed, J., dissenting). Chief Justice Burger, a year prior to penning the *Lemon* test explained that

> [t]he considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.

Walz v. Tax Commission, 397 U.S. 664, 668 (1970). Even while introducing the test, the Chief Justice warned that the Court should not "engage in a legalistic minuet in which precise rules and forms must govern." *Lemon*, 403 U.S. at 614.

Despite these protestations, courts bound to respect this Court and to comply with its precedents have fallen victim to the melodic soothing of *Lemon*'s simplicity, hypnotically adopting

and enthusiastically applying the *Lemon* test as the sole and controlling criterion for Establishment Clause jurisprudence. In the case before the Court, the fourth circuit's decision is representative of the inconsistency and utter disarray application of *Lemon* produces in lower courts.

The fourth circuit minimized the university's provision of in-kind support and "sustenance of religion in [several] incidental respects [which did] not . . . inhibit religion," *Rosenberger v. The Rector and Visitors of the University of Virginia*, 18 F.3d 269, 285 (4th Cir. 1994) (Pet. App. 34a), but then held that use of "public funds to support a publication so clearly engaged in the propagation of particular religious doctrines would constitute a patent Establishment Clause violation." *Id.* (Pet. App. 35a). Rejecting the argument that religion is inhibited, the court relied on the university's other extensive support, but failed to explain why that was not also a "patent" violation of the same clause.

While internal inconsistency of the decision below is unsurprising, if not entirely expected, the fourth circuit took *Lemon* where few enterprising courts have gone before. The court held that the university had "penalize[d] exercise of constitutional rights by withholding from [the religious students] an otherwise discretionary benefit." *Id.* at 281 (Pet. App. 25a). This "creates an *uneven playing field* on which the advantage is tilted towards . . . wholly secular modes of expression." *Id.* (Pet. App. 26a) (emphasis added). After finding such discrimination unconstitutional under the Free Speech Clause, the court then used *Lemon* to nullify its own conclusion. Miraculously, the "uneven playing field" decried

in part one, was transformed into "neutrality" under *Lemon* in part two. *Id.* at 284-85 (Pet. App. 37a). Under the fourth circuit's analysis, *Lemon* is read to consume not only the Establishment Clause, but the entire First Amendment.[2]

The results in lower courts reflect the breadth of cloudy confusion that plagues those courts which reflexively apply the *Lemon* test in every sort of Establishment Clause case. Although some of the decisions seem amusing, they all bear the scent of that "relentless extirpation of all contact between government and religion," which does not accurately or adequately reflect "the history or the purpose of the Establishment Clause." *Allegheny County*, 492 U.S. at 657 (Kennedy, J., concurring in part and dissenting in part).

As Judge Easterbrook noted recently, "*Lemon* has lost its tang [.]" *Harris v. City of Zion*, 927 F.2d 1401, 1419, 1424 (7th Cir. 1991) (Easterbrook, J., dissenting). Whether through inherent defect, mechanistic overuse, or a wringing approach that guarantees caustically antireligious results, the mere selection of the *Lemon* test is now a signal of a court's intention to overturn challenged government practices and policies. This case presents this Court with the prospect, not merely of adjusting the error of the lower courts in the instant case, but to

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2 The fourth circuit completes its slight of hand with the dictum that the Free Exercise Clause would also support the conclusions reached under its Free Speech analysis. *Id.* at 283 n.31 (Pet. App. 30a-31a n.31). Sadly, the Equal Protection Clause appears to be *Lemon*'s next victim. *See id.* at 287-88 (Pet. App. 57a-58a). One can only guess what other liberties *Lemon*, in the hands of inferior courts, will jeopardize for religious citizens.

check and clarify the general confusion of the judiciary which attends the litigation of Establishment Clause claims.

B. Because *Lemon* Has Proven Unworkable, That Test, With Its Muddled Progeny, Should Now be Overruled Or Clarified

The Religion Clauses preclude the government from discriminating against citizens because of their religion. In *Zorach v. Clauson*, 343 U.S. 306 (1952), this Court discussed the impermissibility of governmental hostility toward religion:

> To hold that [government] may not [accommodate religion] would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Id. at 314. *See also Lynch*, 465 U.S. at 673.

In *McDaniel v. Paty*, 435 U.S. 618 (1978), Justice Brennan wrote that the provision there, which barred clergy from serving as state legislators, violated the Establishment Clause because it manifested "patent hostility toward, not neutrality respecting, religion . . . and, in sum, has a primary effect which inhibits religion." *id.* at 636 (Brennan, J., together with Marshall, J., concurring in the judgment).

The religious heritage of the American people also dictates

that government not be hostile to religion. In *Zorach*, this Court noted:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary.

343 U.S. at 313-314. *See also Walz v. Tax Comm'n*, 397 U.S. 664, 676-77 (1970) (few concepts are "more deeply embodied in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally . . .").

Hostility toward religion robs American democratic institutions of a major source of the values which inform them. The American political tradition presupposes a government which does not seek to shape its people's values, but rather is itself shaped by them. Thus, religion has traditionally played a central role in the development of public virtue.

> Neither government nor this Court can or should ignore the significance of the fact that . . . many of our legal, political and personal values derive historically from religious teachings.

Abington School District v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., together with Harlan, J., concurring).

Despite its opinions eschewing any appearance of hostility to religion, this Court's First Amendment jurisprudence readily lends itself to the fomenting of such hostility. *Lemon*'s shallow roots in our history of religious freedom, and the ease with which its prongs may be used to bump religious expression and liberty into a second-class status in the marketplace of ideas, have brought about the very confusion and hostility sought to be avoided.

1. The *Lemon* Test Produces Confusion, Not Neutrality

a. The Secular Purpose Prong

Lemon's first prong requires a secular purpose for all government action. *Lemon* at 612-13. This Court treats the secular purpose prerequisite as meaning *any* secular purpose. *See e.g., Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) ("a statute must be invalidated if it is *entirely* motivated by a purpose to advance religion"). Although this Court has only used the purpose prong to defeat government action three times since *Lemon*, in *Edwards v. Aguillard*, 482 U.S. 578, 585-89 (1987), *Jaffree* at 56, and *Stone v. Graham*, 449 U.S. 39, 40-41 (1980), it poses a significant threat of confusing lower courts and abusing religious liberty.

Even when religious exemptions are provided on a nondiscriminatory basis, the purpose of the legislature is to remove burdens on religious freedom; thus, the government's action "advances" the cause of religion. The secular purpose prong induces tension between the Religion Clauses, failing to

take account of the fact that "intentional advancement of religion is sometimes required by the Free Exercise Clause." *Edwards* at 627 (Scalia, J., together with Rehnquist, C.J., dissenting) (citations omitted); *see also Grumet*, 114 S.Ct. at 2498 (O'Connor, J., concurring in part and concurring in the judgment) (attributing the unconstitutional attempt at accommodation to prior Supreme Court rulings). As Justice O'Connor explained, "[i]t is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden." *Jaffree* at 83 (O'Connor, J., concurring).

This case demonstrates the extent to which the purpose prong may be manipulated. The fourth circuit deferred to the university's conclusion that the funding of religious activities would not further its "educational mission," 18 F.3d at 284 (Pet. App. 33a), despite the fact that religious discussion and education is part of the university's academic curriculum. *Id.* Under this application of the purpose prong, the government is allowed to define religion out of the marketplace of ideas. This discriminatory subterfuge was upheld as advancing the "secular purpose" of avoiding "an establishment of religion at the institution." *Id.* Thus, the Establishment Clause is not offended because the "purpose" is to avoid offending the Establishment Clause. *Id.* at 284 (Pet. App. 33a-34a). Under the fourth circuit's interpretation of *Lemon*, the purpose prong not only directly contradicts this Court's warnings against religious hostility, it becomes circular as the maze of logic grows longer.

Not only has the purpose prong "made such a maze of the

Establishment Clause that even the most conscientious governmental officials can only guess what motives might be held unconstitutional," *Edwards*, 482 U.S. at 636 (Scalia, J., together with Rehnquist, C.J., dissenting), but "discerning the subjective motivation of those enacting the statute, is to be honest, almost always an impossible task." *Id.* *Lemon* thus fails to heed the warning "that determining the subjective intent of legislators is a perilous enterprise." *Id.* at 638.

b. The Effects Prong

The second prong of the *Lemon* test requires that "the principal or primary effect [of government action] must be one that neither advances nor inhibits religion." *Lemon* at 612. Since *Lemon*, this Court has only once struck down government action as "inhibiting" religion. *Larson v. Valente*, 456 U.S. 228 (1982). This is not surprising, as faithful application of the effects prong is impossible without absolute equality. As Justice Frankfurter explained:

> Religious beliefs pervade, and religious institutions have traditionally regulated virtually all human activity . . . . State codes and the dictates of faith touch the same activities. Both aim at human good, and in their respective views of what is good for man they may concur or they may conflict. No constitutional command which leaves religion free can avoid this quality of interplay.

McGowan v. Maryland, 366 U.S. 420, 461-62 (1961) (Frankfurter, J., with Harlan, J., concurring in the judgment).

Clearly, every government action will, in some respect, either "advance" or "inhibit" a subject which pervades "virtually all human activity." Thus, similar to the purpose prong, the effect prong is unworkable as a model for distinguishing between those government actions which advance religion only (i.e., an establishment of religion), and those actions advancing religious freedom (i.e., an accommodation of religion).

Of more fundamental concern, prohibiting government action which has the effect of advancing religion readily permits discrimination against religion in the provision of government benefits. In the case before the Court, the university takes fourteen dollars per semester from every full-time student for student activities. 18 F.3d at 270 (Pet. App. 2a). The funds are used to support a "wide variety of student organizations, activities, and publications," *id.*, as long as they are not, *inter alia*, political or religious. *Id.* at 271 (Pet. App. 3a). Amazingly, the fourth circuit held that this discrimination does not "inhibit" religion. *Id.* at 283 (Pet. App. 34a).

In the economic marketplace, the notion that taxation without equal subsidization would not "inhibit" the nonsubsidized competitor is bad economic theory. In the marketplace of ideas, the theory is no more legitimate. As Justice Brennan has explained, "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,' (rather) than through any kind of authoritative selection." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Here, the selective provision of general funds is at the heart of the university's "authoritative selection" process. The illogic of the

conclusion that this does not "inhibit" religion is astounding.[3]

This Court has clearly held that "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Board of Education v. Mergens*, 496 U.S. 226, 248 (1990) (citation omitted). Yet, *Lemon*'s effect prong clearly gives lower courts license to deny Religion or religious people equality in the provision of general government benefits; this Court must then revoke this license piecemeal as it creates more confusion with each sidestep of *Lemon*. *See, e.g., Lamb's Chapel v. Center Moriches School Dist.*, 113 S.Ct. 2141, 2148 (1993); *Zobrest v. School District*, 125 L.Ed. 1, 10 (1993). The language of *Lemon* lives on and its inherent confusion reigns in lower courts that torturously misapply it to the detriment of Religion and religious adherents.

c. The Entanglement Prong

The third and most tangled web of the *Lemon* test prohibits

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3 The fourth circuit's astonishing conclusion that the university would be advancing religion by treating religious groups equally, 18 F.3d at 283 (Pet. App. 35a), is further evidence of *Lemon*'s invitation to the bizarre. It is as if the university and the lower courts believe religious adherents do not need to be treated equally to compete on par with other philosophical and scientific views in the quest to prove their religious tenets and ideas are the"truth" Justice Brennan wrote about. Religious citizens must have some hidden fountain of wealth that never runs dry; but, from the public fountain, all nonreligious citizens and groups may drink and the government even draws the water. Perhaps the Commonwealth of Virginia believes in a miraculous Divinity after all.

"excessive entanglement" between government and religion. *Lemon* at 613. As noted above, preventing all entanglement of religion and government is impossible; it is, equally, unwise. As Justice Brewer explained in *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), "[e]very constitution of every one of the . . . States contains language which . . . recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community . . . . [T]hey affirm and reaffirm that this is a religious nation." *Id.* at 468, 470. *See also Zorach*, 343 U.S. at 306 ("We are a religious people whose institutions presuppose a Supreme Being . . ."). Recently, recognizing this tradition, Justice Scalia wrote that "those who adopted our Constitution . . . believed that the public virtues inculcated by religion are a public good . . . . Unsurprisingly then, indifference to 'religion in general' is *not* what our cases, both old and recent, demand." *Lamb's Chapel*, 113 S.Ct. at 2151 (Scalia, J., together with Thomas, J., concurring in the judgment) (emphasis in original) (citations omitted). Thus, some entanglement of the civil and religious is not only inevitable, but quite welcome.

The qualifier "excessive" does not save *Lemon*'s third prong from absurd and confusing results. Indeed, even before *Lemon*, this Court had recognized the paradox inherent in asking government to maneuver one way or the other to avoid "excessive entanglement" with religion. *See Walz*, 397 U.S. at 674 (acknowledging that elimination of tax exemptions for religious organizations would tend to expand, not contract government involvement with religion). In *Widmar v. Vincent*, 454 U.S. 263 (1982), this Court noted that to exclude all religious groups from a privilege granted to others would risk

greater entanglement as

> the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many various beliefs meet the constitutional definition of religion."

Id. at 272 n.11 (citation omitted). Entanglement, then, can mean any number of things and leaves government in the same incurable position as the other two prongs; stuck with an "insoluble paradox." *Wallace v. Jaffree*, 472 U.S. 38, 109 (1985) (Rehnquist, J., dissenting); *Lemon* at 668 (White, J. concurring in part and dissenting in part).

Like the effects prong, entanglement readily allows discrimination against religious citizens. In the case at bar, while the fourth circuit held that the refusal to grant a general benefit to religious organizations is justified by the entanglement prong of *Lemon*, it found no problem in granting those benefits to such "cultural organizations" as the Muslim Students Association and the Jewish Law Students Association. 18 F.3d at 287 (Pet. App. 41a). Curiouser and curiouser, the fourth circuit's entanglement analysis largely rested on the "'potential for political divisiveness related to religious belief and practice' . . . ." *Id.* at 285 (Pet. App. 37a). The court must fear that "'facilitating discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints,'" *Id.* at 272 (Pet. App. 5a) (quoting Wide Awake Productions' Constitution), is somehow a call to arms. The fourth circuit failed to explain how the Jewish and Muslim students are trusted to

live in peace and harmony while treating *religious* students equally is believed to be the first step toward Holy war.[4] The fact that Ronald Rosenberger has been in litigation with the university for over four years because of discrimination against religion and religious students, not because of its funding, provides the final and most emphatic example of another *Lemon* "insoluble paradox."

2. *Lemon* and its Confusing Progeny Should Be Overruled

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4 Perhaps the court believed that Jews and Muslims have a milder history of "divisiveness." Of course, such a distinction between the "political divisiveness" of religion and the "cultural divisiveness" between Jews and Muslims is not only practical fantasy, it is historical nonsense.

The Commonwealth of Virginia has come full circle after two centuries. This Court has noted that James Madison's views "accurately reflect[] the spirit and purpose of the Religion Clauses of the First Amendment," *McDaniel*, 435 U.S. at 624. Madison's Remonstrance condemns the very discrimination the university here seeks to justify:

> [T]he bill violates that equality which ought to be the basis of every law, and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached. If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore no less, one than another, of their natural rights . . . . As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions.

Madison, A Memorial and Remonstrance Against Religious Assessments, 1785, *reprinted in Everson v. Board of Educ.*, 330 U.S. 1, 66 (1947) (App. to opinion of Rutledge, J., dissenting).

Lemon has produced results in lower courts at odds with the neutrality required by the Constitution's text and history. *Lemon*'s progeny have also sanctioned varying degrees of hostility to religion, placing religious adherents at a disadvantage with regard to other citizens.[5] This Court now has "the proper case . . . [to] bring [its] Establishment Clause jurisprudence back to . . . the proper track--government impartiality, not animosity, towards religion." *Grumet*, 114 S.Ct. at 2498 (O'Connor, J., concurring in part and concurring in the judgment); *see also id.* at 2505 (Kennedy, J., concurring in the judgment); *id.* at 2515 (Scalia, J., together with Rehnquist, C.J., and Thomas, J., dissenting).

II. GOVERNMENT MAY NOT USE RELIGION OR RELIGIOUS ADHERENCE AS A BASIS OF CLASSIFICATION EXCEPT TO AVOID INFRINGEMENT OF RELIGIOUS FREEDOM

In *McDaniel v. Paty*, 435 U.S. 618 (1978), Justice Brennan presented an interpretation of the Religion Clauses, gleaned from this Court's precedents, which is faithful to the historical understanding and proper harmony of the First Amendment:

> Beyond the[] limited situations in which government

5 *See, e.g., Edwards v. Aguillard*, 482 U.S. 578 (1987); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Levitt v. Committee for Public Educ. & Religious Liberty*, 413 U.S. 472 (1973); *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

> may take cognizance of religion for purposes of accommodating our traditions of religious liberty, government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits.

Id. at 639 (Brennan, J., concurring) (footnote omitted). This principle of equality of religious exercise should replace *Lemon* as guiding "[t]he general nature of [the Court's] inquiry in this area . . . ." *Mueller v. Allen*, 463 U.S. 388, 394 (1983).

A. The Founders Understood the Religion Clauses to Compliment Each Other, Ensuring that Religion or Religious Adherence is Pertinent Only to Accommodation of Religious Freedom

A proper understanding of the First Amendment views it as a political compromise among several colonies worried about the power of a centralized government encroaching on local beliefs.[6] This fear of centralization forced a compromise among various founding colonial views. As this Court correctly noted in *Everson*, "[n]o one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty." 330 U.S.

6 *See* CORD, SEPARATION OF CHURCH AND STATE 14-15 (1982); MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 3, 22, 172 (1965); *see generally* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

at 11. The views of Virginia's leaders should be relevant only as they respect this equality. Madison believed that

> equality [] ought to be the basis of every law . . . . If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "*equal* title to the free exercise of Religion according to the dictates of conscience."

Memorial and Remonstrance, *reprinted in Everson*, 330 U.S. at 66 (App. to opinion of Rutledge, J., dissenting) (emphasis in original) (footnotes omitted). Madison's ideal government was

> best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property, by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.

Id. at 68. He took these views of equality with him when he led the debate over the Bill of Rights.[7]

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7 As then Associate Justice Rehnquist noted in *Wallace v. Jaffree*, 472 U.S. 38 (1985), Madison's first proposal for the Religion Clauses read:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and *equal rights of conscience* be in any manner, or on any pretext, infringed.

Thus, the Founders understood the Religion Clauses to be mutually supportive, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), prohibiting certain government action which would infringe the equally protected liberty to make one's own decisions regarding Religion.[8]

Even if incorporation is viewed as removing the specific federalism limitation on the amendment, it should not change the content of its substantive limitations. This Court should look to the understanding of the relationship between the Religion Clauses as understood by the Founders to clarify its jurisprudence in this area. A study of opinions other than *Lemon* and its aberrant progeny, demonstrates that this Court has frequently done just that.

B. This Court's Decisions Judging Religious Classifications, Other than *Lemon* and its Inconsistent Progeny, Employ Equality of Freedom of Belief and Opinion as the Governing Principle

1. This Court Used the Equal Protection Clause to Govern the Analysis of Religious Classifications in its Equal Access Cases

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Id. at 94 (Rehnquist, J., dissenting) (citation omitted) (emphasis added); *see generally id.* at 92-100.

8 *See* TRIBE, AMERICAN CONSTITUTIONAL LAW §14-2, 1156-57 (2d. ed. 1988).

This Court has clearly held that "under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views . . . ." *Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972) (citations omitted). This equal protection analysis applies with equal force to religious speech. In *Widmar v. Vincent*, 454 U.S. 263 (1982), this Court held that granting student religious groups equal access to university facilities would not violate the Establishment Clause. *Id.* at 270-76. Accordingly , this Court found "novel" the argument that religious worship, as opposed to speech about religion, is not subject to the same equal protection guaranteed by the First and Fourteenth Amendments. *Id.* at 269 n.6. Indeed, this Court has consistently upheld protection for religious speech in a wide variety of contexts, with no suggestion that the religious content of that speech in any way limits the full force of First Amendment guarantees.[9]

While finding that equal protection must be afforded religious

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9 *See, e.g., ISKCON v. Lee*, 112 S. Ct. 2701 (1992) (upholding ban on solicitation at airport terminals); *Lee v. ISKCON*, 112 S. Ct. 2709 (1992) (per curiam) (distribution of religious literature in airport terminals); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (distribution of religious literature in airport terminals); *Heffron v. ISKCON*, 452 U.S. 640 (1981) (upholding limitation on solicitation at state fairgrounds); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (religious speech in public park); *Marsh v. Alabama*, 326 U.S. 501 (1946) (distribution of religious literature in company town); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (street preaching); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (distribution of religious literature in public places).

speech, this Court has consistently hidden *Lemon*'s paradoxical logic under a bushel of common sense. The focus has changed from looking for effects that "advance" religion, looking instead to whether the effect of the challenged government action is to foster religious uniformity or otherwise interfere with voluntary choices on matters of religion. Thus, in *Widmar*, the issue under the "effects" test was not "whether the creation of a religious forum would violate the Establishment Clause," but rather whether a "University [which] ha[d] opened its facilities for use by student groups . . . [could] exclude groups because of the content of their speech." *Widmar* at 273. The Court was then "unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion." *Id.* In *Board of Education v. Mergens*, 496 U.S. 226 (1990), this Court held that equal access by high school students to school facilities for *religious purposes* was fully compatible with the Establishment Clause. Justice O'Connor emphasized that when the government treats religious groups equally

> the message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.

Id. at 248. *Widmar* and *Mergens* render completely untenable any suggestion that speech by private parties, in government facilities available for use by a variety of outside organizations, could somehow trigger a violation of the Establishment Clause. *Lamb's Chapel v. Center Moriches School Dist.*, 113 S.Ct. 2141 (1993), was the third-time charm of equality for religious

access. There, this Court held that denying access to even non-public forums solely on the basis of the religious perspective of speech was unconstitutional viewpoint-based discrimination. *Id.* at 2147. Leaping over *Lemon* in a single bound, the Court had "no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded." *Lamb's Chapel* at 2148. At a minimum, these cases clearly hold that the First Amendment precludes any governmental effort to single out and censor--or otherwise burden--the speech of private parties *solely because that speech is religious*.

2. As This Court has Retreated From *Lemon* in Cases Directly Challenging State Action Under the Establishment Clause, Various Opinions Have Recognized Equality as the Governing Principle of the Religion Clauses

This Court's precedents, which place Religion and religious adherents on an equal level for First Amendment purposes, are not confined to the Speech Clause. Beginning with *McDaniel*, this Court began to sidestep *Lemon's* constraints when addressing religious liberty issues. In finding that Tennessee could not condition the service in its state legislature on the surrender of the right to exercise religious activity, the plurality saw the state as "punishing a religious profession with the privation of a civil right." *McDaniel,* 435 U.S. at 626 (quoting 5 Writings of James Madison 288 (G. Hunt ed. 1904)). Justice Brennan explained, "[r]eligionists no less than members of any

other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." *Id.* at 640-641 (Brennan, J., concurring) (footnote omitted). Wishing to be more explicit about the equality basis for the Court's decision, Justice White suggested that the state law should be found "unconstitutional under the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 643 (White, J., concurring in the judgment).

As this Court has turned to an equality reasoning under the Religion Clauses, the focus has been on the "benefit" of an enactment as it relates to comparable benefits made generally available. *Larson v. Valente*, 456 U.S. 228 (1982), provided the starting point for bridging the gap of equality from the Speech Clause to the Establishment Clause. Citing *Widmar*, this Court subjected a statute to strict scrutiny because it imposed greater administrative burdens on religious groups soliciting more than fifty percent of their funds from nonmembers than other religious groups. *Larson* at 247. Finding the statute a violation of the Establishment Clause, Justice Brennan explained:

> Madison once noted: "Security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests and in the other in the multiplicity of sects." Madison's vision--freedom for all religion being guaranteed by free competition between religions--naturally assumed that every denomination would be equally at liberty to exercise

and propagate its beliefs.

Id. at 245 (footnote omitted). In *Mueller v. Allen*, 463 U.S. 388 (1983), this Court completed this half of the bridge from *Widmar*, recognizing equality between Religion and nonreligion. *Mueller* involved a state statute providing tax deductions for school expenses for parents of children attending public and private schools. Consistent with *Widmar* and *Larson*, this Court, in finding the statute did not violate the Establishment Clause, noted that "'[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect.'" *Mueller* at 397 (citation omitted). *See also Bowen v. Kendrick*, 487 U.S. 589, 609 (1988); *Witters v. Wash. Dept. of Ser. for Blind*, 474 U.S. 481, 487 (1986). Chief Justice Rehnquist summarized this neutrality concept in *Zobrest v. School District*, 125 L.Ed. 1 (1993):

> [W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Id. at 10 (citing *Bowen*, *Widmar*, *Mueller*, and *Witters*) (citations omitted).

In this Court's latest Establishment Clause case, every Justice agreed with this principle of equality. *See Board of Education v. Grumet*, 114 S.Ct. 2481, 2487 (1994) (plurality opinion of Souter, J., together with Blackmun, Stevens, and Ginsburg, JJ.);

at 2497 (O'Connor, J., concurring in part and concurring in the judgment); at 2504 (Kennedy, J., concurring in the judgment); at 2508 (Scalia, J., together with Rehnquist, C.J., and Thomas, J., dissenting). As Justice Kennedy explained:

> [T]he Establishment clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial.

Id. at 2504 (Kennedy, J., concurring in the judgment).

Here, the university seeks to justify religious segregation by drawing a fine distinction between provision of equal access and equal provision of general subsidies. Yet, this strange notion of "neutrality" is out of step with this Court's path back toward equality after *Lemon*.[10] The logical next step for religious equality is to extend the equal protection to all forms of generally available government assistance, so as to completely bridge the gap between the Establishment Clause and the rest of the First Amendment. This does not require a

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10 The university hopes to save its strained logic by relying on *Lemon* and a long list of its aberrant offspring. Respondent's Brief in Opposition at 19. At base, the university's long list of citations supporting its understanding of "neutrality" is simply a convenient compilation of this Court's departures from the equality principle which steadily began after 1971. We have our own list *supra* note 5.

novel construction project; *Lemon* has, in fact, smoldered, slowly spreading to consume planks of equality that this Court had laid throughout its dealings with the Religion Clauses.

3. First Amendment Decisions Preceding *Lemon* Recognized Equality as the Governing Principle of the Religion Clause.

This Court consistently adhered to the equality principle for Religion and religious adherents, prior to *Lemon*. In 1899, this Court upheld an agreement between the Commissioners of the District of Columbia and a religiously affiliated hospital whereby the Federal Government would pay for the construction of a building on the hospital grounds. *Bradfield v. Roberts*, 175 U.S. 291 (1899). Without proof the hospital discriminated on the basis of religion or otherwise operated inconsistent with the aid, its religious affiliation was found "wholly immaterial." *Id.* at 298. A commitment to equality continued in this Court's opinions addressing the Establishment Clause. In *Everson*, Justice Douglas wrote that government

> cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation . . . . [w]e must be careful, in protecting . . . against state-established churches, to be sure that we do not inadvertently prohibit [the state] from extending its general state law benefits to all its citizens without

> religious belief.

330 U.S. at 16 (emphasis in original).

In referring to the First Amendment's required religious voluntarism, which protects the freedom to choose a religion or none at all, Justice Harlan has explained that

> [*n*]*eutrality in its application requires an equal protection mode of analysis*. The Court must survey meticulously the circumstances of government categories to eliminate, as it were, religious gerrymanders.

Walz, 397 U.S. at 696 (Harlan, J., concurring) (emphasis added); *see also Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (First Amendment "mandates government neutrality between religion and religion, and between religion and nonreligion"); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (footnote omitted) (government cannot "pass laws or impose requirements which aid all religions as against non-believers, and [] can[not] aid those religions based on a belief in the existence of God as against those religions founded on different beliefs"). As these opinions demonstrate, long before *Lemon* soured this Court's Religion Clause jurisprudence, equality was the guiding principle.

Viewing the First Amendment through the lens of equality returns the Religion Clauses back to what they were originally meant to be, two sides of the same coin used to purchase liberty of religious voluntarism. This is the view of religious liberty

envisioned by the Framers, respected by this Court's Religion Clause cases before *Lemon*, and nurtured in various Speech, Establishment, and Free Exercise cases since *McDaniel*.

CONCLUSION

For the foregoing reasons, the Court should reverse the decisions of the lower courts in this case, adopting the "equality" (or "neutrality") analysis employed consistently before *Lemon* and sporadically thereafter.

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